IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 109

SEA-LAND SERVICE, INC., *Appellant*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY ET AL., *Appellees*

On Appeal from the United States District Court for the District of Connecticut

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BRIEF FOR APPELLANT SEA-LAND SERVICE, INC.

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CITATIONS

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OPINIONS BELOW

The opinion of the district court (R. 241-262) is reported at 199 F. Supp. 635. The report of the Interstate Commerce Commission (R. 4-69) is printed at 313 I.C.C. 23.

JURISDICTION

The judgment of the three judge district court (R. 263-264) was entered on January 8, 1962. Sea-Land Service, Inc., filed its notice of appeal (R. 266-268) on March 9, 1962 and probable jurisdiction was noted on October 8, 1962. (R. 273-274) The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b).

STATUTES INVOLVED

The National Transportation Policy (49 U.S.C. preceding sections 1, 301, 901, 1001) and sections 15(7), 15a, 305(c), and 307(d) (49 U.S.C. 15(7), 15(a), 905(c) and 907(d)) respectively, are set forth in the Appendix.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether, under Section 15a(3) of the Interstate Commerce Act and the National Transportation Policy, the Commission may find not shown to be just and reasonable, and require cancellation of, certain reduced railroad trailer-on-flatcar rates, which are compensatory (i.e. exceed the railroads' out-of-pocket costs in all instances and their fully-distributed costs in many instances) but represent substantial reductions from levels maintained elsewhere, to the same levels of the rates of the coastal water carriers and are applicable only to points served by the coastal water carriers, where the water carriers' service cannot compete at equal rates with the railroads' service and where the reduced rail rates are part of a program of rail rate reductions which threatens the continued existence of the coastal water carriers?

2. Whether, under the foregoing circumstances, the Commission may find such rail rates to be unlawful without finding as a controlling consideration that the competing water carriers are the low cost mode of transportation?

3. Whether, if the Commission must make such a finding, it must do so in terms of the "integral overall rate structure" of the competing modes of transportation?

4. Whether, if the Commission must make such a finding, it is precluded from rejecting any rail rate for a particular movement which yields the railroad's fully-distributed cost which is lower than the fully-distributed cost of the competing water carrier?

5. Whether the Court below, in reversing the Commission's decision that the rail TOFC rates at issue are not shown just and reasonable, has exceeded its statutory function and improperly substituted its judgment for that of the Commission.

STATEMENT OF THE CASE

This proceeding involves the validity of an order of the Interstate Commerce Commission (R. 70-75) directing the cancellation of 66 substantially reduced railroad freight rates applied to their TOFC, or "piggyback", service between points in the east, on the one hand, and Dallas and Fort Worth, Texas, on the other. These rates were published *only* from and to points served by the two deep water common carriers now in the Atlantic/Gulf coastwise trade, i.e. appellants Sea-Land Service, Inc. (formerly Pan-Atlantic Steamship Corporation) and Seatrain Lines, Inc. (R. 19)

1. Both Sea-Land and Seatrain have operated in the coastwise trades for many years. Until 1957, Sea-Land operated a so-called break-bulk type service, involving the physical handling of cargos into and out of vessel holds. In order to increase efficiency, and reduce operating costs, Sea-Land in 1957 converted its operation into a "lift-on-lift-off", or trailership, operation which involves the transportation of 226 demountable highway trailers on specially designed vessels. (R. 8-9) Appellant Seatrain has operated a "containership" type service, involving the transportation on vessels of railroad cars, since the early 1930s, and also operates a "Seamobile" service, involving the transportation on its vessels of trailers. (R. 25-26)

2. In a competitive move specifically aimed at the newly instituted Sea-Land (Pan-Atlantic) trailership service the appellee railroads published the aforesaid 66 drastically reduced rates applicable to their TOFC services between eastern points and Dallas/Fort Worth, these rates being described by them as "pilot" rates. (R. 19) Inasmuch as these rates would leave higher rates in effect to and from intermediate points in violation of Section 4(1) of the Act (49 U.S.C. § 4(1)) appellees also applied for relief from the provisions of that section. (R. 19-20) On numerous protests these rates were suspended by the Commission in I & S Docket 6834 *Piggyback Rates—Between East and Texas.* On December 9, 1960, the Commission issued its report and accompanying order (313 I.C.C. 23) (R. 4-75) finding that the reduced TOFC rates at issue had not been shown to be just and reasonable, directing their cancellation without prejudice to the filing of new schedules in conformity with its conclusions, and denying the application for 4th section relief.

3. Despite the finding of the Commission that the appellee railroads were free to establish reduced rates on the considered traffic at a level 6 per cent higher than the competitive Sea-Land and Seatrain rates (R. 41-42), which level would have permitted sharing of the traffic by the railroads and the water carriers, the railroads have contested the Commission's order, primarily on the ground that it runs contrary to the provisions of section 15a(3) of the Act (49 U.S.C. 15a(3)). The appellees take the position that under that section, enacted in 1958, they are free to reduce their rates to any level that will return their out-of-pocket costs of transporting the traffic, entirely irrespective of the effect of that reduction upon the operation of competing modes of transportation, or more particularly the domestic water carriers.

THE FINDINGS OF THE COMMISSION

In its decision below holding that the reduced TOFC rates at issue have not been shown to be just and reasonable the Commission found:

1. That the reduced railroad trailer-on-flatcar rates at issue, representing substantial reductions from levels maintained elsewhere, were published solely for the purpose of establishing a basis of rates exactly equal to that maintained by the two existing coastal water carriers, Sea-Land Service, Inc. and Seatrain Service, Inc.; (R. 18-19)

2. That the reduced TOFC rates at issue apply only from and to points effectively served by the coastal water carriers and that rates to and from other points have not been reduced; (R. 19)

3. That the water carrier services although efficiently operated (R. 41) are inferior to the

rail TOFC services and that the water carriers cannot compete at equal rates with the rail TOFC services (R. 34), due to factors such as the uncertainty of ocean transport, infrequency of sailings, and longer transit time; (R. 28)

4. That the reduced TOFC rates at issue cover the railroads' out-of-pocket costs in all instances and their fully distributed costs in some instances; (R. 22)

5. That with respect to the 66 TOFC rates at issue Sea-Land is the low cost carrier, although the Commission made it clear that it was not resting its decision on "relative costs"; (R. 36-37)

6. That the maintenance of domestic coastwise shipping is in the national interest and required by the national defense; (R. 38-41)

7. That if the domestic coastwise industry is to attract traffic it must be permitted to assess rates lower than those via railroad; that the industry must maintain rates 6 per cent below the competitive rail TOFC rates in order to participate in the traffic; (R. 41-42)

8. That if Sea-Land Service, Inc. is to survive it must on an overall basis recover its full costs of operation; (R. 35)

9. That the proposed reduced railroad TOFC rates under consideration, which accord the water carriers no rate differential, are an initial step in an overall program of rate reductions that threaten the continued operation of the coastwise water carrier industry; (R. 38)

10. That the proposed reduced railroad TOFC rates are unreasonably low, and competitively destructive, to the extent that they are below a level 6 per cent higher than the present water carrier rates. (R. 41-42)

THE OPINION OF THE COURT BELOW

The Court below holds that under the provisions of Section 15a(3) of the Act the Commission may not condemn a reduced railroad rate that returns fully distributed costs unless it is found, (a) that the competing water carrier services are "in general" the low cost mode; (b) that value of service considerations demand water carrier rates on particular movements which each return to the water carriers more than their fully distributed costs and (c) that unless as to the particular movements involved the water carrier is the low cost carrier on a fully distributed cost basis. (R. 259) The court has construed Section 15a(3) as a flat prohibition against the prescription of rate differentials except where competing modes would be destroyed by rates set so low as also to harm the *proponent* of those rates, or so low as to deprive the competing mode of its inherent advantage of low costs (R. 251-252). In addition, the Court has held that in order to be entitled to protection the competing mode must be the "overall low cost mode" rather than merely the low cost mode with respect to the particular movements involved (R. 255, 256, 259).

SUMMARY OF ARGUMENT

The Court below erred (a) in holding that Section 15a(3) of the Interstate Commerce Act substantially deprives the Commission of discretion in the adjudication of intermodal rate controversies; (b) in holding

that "relative cost" is under that subsection the sole, or controlling, standard to be applied.

The legislative history of the Interstate Commerce Act manifests a clear intention by the Congress that the Act be so administered that as an end result all forms of domestic transportation will be fostered and preserved. The national transportation policy, specifically referred to in Section 15a(3), enjoins against "unfair or destructive competitive practices" by the carriers. This can only mean that in its construction of Section 15a(3) the Commission must take into account the destructive effect of rate reductions on carriers of different modes; that it must look beyond merely the effects of these reductions upon the carriers making them. This is borne out by the legislative history of Section 15a(3), including the rejection by the Congress of proposed legislation—the "three shall nots"—that would have required the Commission to ignore the intermodal competitive impact of rate reductions.

The Commission in its decision below has correctly found that the reduced rail rates at issue are a part of a selective program of rate cutting that, if unchecked, would threaten the extinction of the deep water coastal trades, contrary to the national interest. The concern for the preservation and well-being of the domestic water carrier trades, expressed in the legislative history of the Interstate Commerce Act and by Congressional committees and administrative agencies of the United States Government, was properly recognized by the Commission. In the circumstances it refused to be limited in its consideration of the lawfulness of the reduced rail rates at issue to the question of relative cost. The Court below erred in deprecating

the economic and military importance of the domestic water carriers and in failing to recognize a Congressional intent that these considerations be taken into account by the Commission in deciding the issues.

Moreover, in substituting its judgment for that of the Commission, the Court below has exceeded its statutory function and gone beyond the proper area of judicial review. Decisions with respect to the proper levels, absolute as well as relative, of carrier rates require the application of expertise which the Commission, and not the Courts, has been held to possess.

ARGUMENT

Point I. The Interstate Commerce Act does not require the Commission to adjudicate intermodal rate controversies solely, or primarily, on the basis of relative cost

The national transportation policy (49 U.S.C. preceding §§ 1, 301, 901, 1001) was added to the Interstate Commerce Act in the Transportation Act of 1940, at the same time that domestic water carriers were brought under Interstate Commerce Commission regulation. This policy has been preserved by specific incorporation in Sect. 15a(3). The policy states:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation service, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to

> cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

The purpose of the policy was to set out guide lines that would assure fair and impartial regulation of all carrier modes, so that, individually and collectively, the nation's carriers could make maximum contributions to an adequate national transportation system. The policy represents formal recognition of the fact that the regulation of individual carrier modes cannot be conducted in a vacuum; that the regulation of one mode must be accommodated to the regulation of the other modes—all to the end of developing and fostering a strong national transportation system.

Among other things the national transportation policy reaffirmed the previously expressed Congressional intent that the "law of the jungle" should not prevail in transportation; that one carrier mode should not be permitted to destroy another by "unfair or destructive" competitive practices. As the Court stated in *Eastern-Central Motor Carriers Association* v. *United States* 321 U.S. 194, 206 (1944), referring to the national transportation policy:

> "This, while intended to secure the lowest rates consistent with adequate and efficient service and to preserve within the limits of the policy the inherent advantages of each mode of transportation,

> at the same time was designed to eliminate destructive competition not only within each form but also between or among the different forms of carriage."

In *Dixie Carrier, Inc.* v. *United States* 351 U.S. 56, 59-60 (1956) the court stated "It was emphasized that one of the evils to be remedied (by the Act of 1940) was cut-throat competition, whereby strong rail carriers would reduce their rates, putting water carriers out of business".

Of course, the Congress has been aware of the need for the protection of carrier modes, particularly the weaker ones, from the predatory rate practices of other modes at least since 1920. To this end the Transportation Act of 1920 gave the Commission the power to fix minimum rates so as, as stated by this Court, "to keep in competitive balance the various types of carriers and to prevent ruinous rate wars between them." *New York* v. *United States,* 331 U.S. 284, 346. As stated in H. Report No. 456, 66 Cong., 1st Sess., p. 19, with reference to the minimum rate power proposed for inclusion in the Transportation Act of 1920:

> "* * * With this power the Commission could prevent a rail carrier from reducing a rate out of proportion to the cost of service, by establishing a minimum, below which such carrier could not fix its rate. *It would also prevent a rail carrier from destroying water competition between competitive points by prohibiting such carrier from so reducing its rates as to destroy its water competitor.* Circumstances have been cited where the rail carrier destroyed its water competitor by such a reduction of rates as to make it impossible for the water carrier to survive. When once competition was thus driven off the rail rates would be

restored or would rise to even higher levels. * * *"
(Emphasis added)

Section 15a(3) evolved from several years of hearings and reports on the proper purpose and scope of the regulation of intermodal rate competition. A proposal in 1955 by the President's Advisory Committee on Transport Policy and Organization, under the chairmanship of the Secretary of Commerce, recommended the elimination of the phrase "unfair or destructive competitive practices" from the national transportation policy,[1] and the enactment of a new rule of rate making, as follows:

> "(3) In the exercise of its power to prescribe just and reasonable rates, the Commission shall not consider the effect of such rates on the traffic of any other mode of transportation; or the relation of such rates to the rates of any other mode of transportation; or whether such rates are lower than necessary to meet the competition of any other mode of transportation."

This proposal, known as the "three shall nots", was supported by the railroads and opposed by the water and motor carriers, as well as the Commission. This proposed amendment did not emerge from Committee nor did the rate making rule which finally emerged, and was enacted as Section 15a(3), bear any resemblance thereto. That section reads as follows:

> "(3) In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determin-

[1] See *Transport Policy and Organization*, hearings before a subcommittee of the House Committee on Interstate and Foreign Commerce. 84th Cong., 1st Sess. (1955). This proposal was not adopted.

> ing whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

In reporting out this new section of the Act the Senate Committee on Interstate and Foreign Commerce made it plain that although its purpose was to encourage competition in transportation, rate making was to continue to be regulated by the Interstate Commerce Commission "to prevent 'unfair or destructive competitive practices' as contemplated by the declaration of national transportation policy."[2]

On the House side the following colloquy occurred between Representative Harris, Chairman of the Committee on Interstate and Foreign Commerce, and Representative Thompson, in the debates on Section 15a(3):[3]

> "Mr. Thompson of Texas. These questions are asked on behalf of the gentleman from Texas (Mr. Thomas) and myself, whom the gentleman will recognize as having water carriers in their Districts. I will say that I have no questions concerning the need and value of the bill, but the water carriers in my area have two questions they would like to have answered. I believe the gentleman has already answered them. One is that it is not intended by this bill to take away any of the inherent advantages of the coastal carriers?

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[2] S. Rep. No. 1647, 85th Cong., 2d Sess. 3-4 (1958).

[3] 104 Cong. Rec. 12,531-12,532.

"Mr. Harris. Very definitely and positively not; and the Commission must take into consideration the transportation policy of 1940.

"Mr. Thompson of Texas. That answers one of the questions they ask. The other is whether the small water carriers will be protected from so-called predatory rate reductions which are not general throughout the country.

"Mr. Harris. I would have to have a little more explanation as to what you refer to as 'little carriers' having protection from what you also refer to as 'predatory rates' in certain sections.

"We followed the new automobile case as laid down by the Interstate Commerce Commission which all carriers agree is correct, as I believe they have. Furthermore, the Supreme Court decided the very same question in an application that was before it in 1957, I believe it was.

"Mr. Thompson of Texas. I think that answers the whole question. In other words, no great carrier can come in with lower rates.

"Mr. Harris. We do not permit any carrier to engage in destructive competitive practices.

"Mr. Thompson of Texas. That answers the question and I thank the gentleman."

The appellee railroads and the Court below have interpreted Section 15a(3) as though it were identical in effect to the proposed "three shall nots". Obviously the two are far apart. The specific reference in Section 15a(3) to the "objectives of the national transportation policy"—absent in the "three shall nots"—was clearly deliberate, and responsive to insistent demands by domestic water carriers, among others. A principal objective of the national transportation policy being the prevention of destructive competitive practices, it

must follow that the Congress intended that intermodal competition that destroys be proscribed in the future, as it had been in the past.

The Commission found in the report here under consideration that the rail TOFC rates at issue were published to apply only between points served by the protestant water carriers; that they would deprive these water carriers of the ability to participate in the traffic; that they were an initial step in a program that, if unchecked, would lead to the extinction of the competing water carrier industry; that the publication of the railroad rates at issue constitutes destructive competition. The Commission in these circumstances properly heeded the injunction of the national transportation policy, as well as other relevant provisions of the act, and found the proposed rail rates unjust and unreasonable.

The Emphasis of the Court Below in "Relative Costs" Is Misplaced

While we do not assert that relative costs are necessarily to be ignored by the Commission in resolving intermodal rate controversies, we do contend that they are but one factor to be considered. We submit that, as the Commission found below, factors other than cost are relevant in situations such as this where the demonstrated effect, if not purpose, of a program of rate reductions will be to destroy a competing mode—the existence of which has repeatedly been held to be in the public interest. (R. 37)

There are valid practical reasons why sole reliance upon relative costs in intermodal rate making would be contrary to the aims and purposes of the national transportation policy. Carrier "costs," as developed

by the soundest available cost finding methods, of necessity represent only approximations of the actual costs of transportating the traffic. Nor may carrier costs be presumed to be possessed of any degree of permanence or stability. Transportation costs are composed of many factors, some of the more important of which are of a constantly changing nature. The total cost of transporting particular commodities from point A to point B at a given time will depend, among other things, on the total volume of traffic moved by the involved carrier, the degree of balance in the movement, the type of equipment in use and the applicable wage scales. Any significant change in any of these factors could substantially affect the "cost" of moving the traffic. The unreliability of "costs" on still other grounds was recognized by the Commission in its report below. (R. 36)

In *Alabama R. Co.* v. *United States*, 340 U.S. 216 (1951) the railroads challenged an order of the Commission prescribing differentials between all-rail rates and joint rates in connection with water carriers. The Court stated:

> "Appellants attack upon the ground that the order gives a competitive advantage, not justified because not supported by a finding of lesser cost of barge service, is not persuasive. Admittedly, barge service is worth less than rail service. It is slower, requires more handling and entails more risk. A shipper will pay only what the service is worth to him. The shippers' evidence, the Commission found, indicated a fairly unanimous view that the principal worth to them of shipping by barge was the saving in transportation expense which it offered. The Commission is not bound to require a rate as high for the inferior as for the superior service. To do so would certainly destroy the

> principal worth of the inferior service and send all freight to the railroads; practically, there would be no competition between the different modes of transportation." * * * (223)

We observe that a similar situation would obtain in the instant proceeding. As the Commission found, the slower and less frequent service of the water carrier demands a lower rate than rail if it is to attract shipper patronage. The allowance of rail rates no higher than the water carrier rates would without question "destroy the principal worth of the inferior service and send all freight to the railroads" and "practically, there would be no competition between the different modes of transportation". The Court below apparently does not quarrel with the Commission finding that the Sea-Land service is inferior in the eyes of the shipping public to the rail TOFC services (R. 246), nor did the railroad appellees base their appeal to the Court below on the ground that the Commission had erroneously found the water service to be inferior.

This Court went on to say in the *Alabama* decision:

> "Neither the Commission nor this Court has held that lesser cost of service is a finding without which the Commission may not fix a charge, division of rate, or differential.[4] On the other hand, the con-

"[4] Both the Commission and this Court have consistently rejected any thought that costs should be the controlling factor in rate making. E. g., *New York* v. *United States*, 331 U.S. 284, 331; *Baltimore & O. R. Co.* v. *United States*, 298 U.S. 349, 359; *Louisiana Public Service Commission* v. *Texas & N. O. R. Co.*, 284 U.S. 125, 132; *Charges for Protective Service to Perishable Freight*, 241 I.C.C. 503, 510-511; *Proposed Lake Erie-Ohio River Canal*, 235 I.C.C. 753, 761; *Literage Cases*, 203 I.C.C. 481, 510; *West Coast Lumbermen's Assn.* v. *Akron, C. & Y. R. Co.*, 183 I.C.C. 191, 198-199; *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.*, 159 I.C.C. 691, 696-697."

> siderations just discussed were rightly taken into account by the Commission. We must not lose sight of the fact that the Commission has the interests of shippers and consumers to safeguard as well as those of the carriers. *Aryshire Corp.* v. *United States,* 335 U.S. 573, 592. The accommodation of the factors entering into rate structures, including competition, is a task peculiarly for the Commission. *Id.,* at 593; *United States* v. *Pierce Auto Lines,* 327 U.S. 515, 535-536." (223-4)

We respectfully reject the notion that the basic purposes and theory of intermodal rate regulation have been completely and drastically changed by the enactment of Section 15a(3), as the Court below holds. We submit that it was *not* the intention of the Congress to strip the Commission of its power to adjudicate intermodal rate controversies on the basis of all of the attending facts, circumstances and considerations or to relegate the Commission to the role merely of a "computer of costs".

As the Court stated in *Board of Trade* v. *United States,* 314 U.S. 534 (1942) at page 546:

> "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. * * *"

Under the court's ruling below the power of the Commission to evaluate the effect of rate wars, or impending rate wars, upon the adequacy and well being of the nation's transportation system, and to take appropriate actions in the premises, would be insignificant.

Thus under the lower court's decision the Commission would have been precluded, as an example, from halting a severe intermodal (truck vs rail) rate war with respect to tobacco products, which it had under consideration in 1960 in *Tobacco From North Carolina to Central Territory*, 309 I.C.C. 347. At page 361 of its decision in that proceeding the Commission said:

> "Where, as here, carriers of competing modes of transportation propose reductions in their rates from levels not in excess of reasonable maximum rates for the sole purpose of attracting regulated traffic one from the other, and the only result thereof to the respondents would be a net revenue loss for all the carriers concerned, the proposals constitute a destructive rate war which this Commission is empowered to avert. Any different conclusion would serve to impair, rather than foster, sound economic conditions in transportation and among the several carriers, and lead ultimately to large-scale dissipation of carrier revenues needed to preserve and maintain a national transportation system adequate to meet the needs of commerce and the national defense."

Had the Congress in enacting the Transportation Act of 1958 intended that for the future relative cost should be the sole, or controlling, consideration in intermodal rate making, or that the carrier mode with the lowest cost should solely by virtue of that fact be allowed to prevail in any rate controversy with another mode, it would obviously have adopted the "three shall nots", or something similar thereto. But the Congress refused to adopt legislative language that would put rate-making into a vacuum and foreclose the broad view of the nation's transportation system, its inter-relationship and the need to prevent rate practices that would destroy important segments thereof. The "law

of the jungle" was unequivocally rejected. It should not be revived by a twisted and unintended interpretation of Section 15a(3) of the Act.

Point II. The Court below compounded its erroneous emphasis on "relative cost" in holding that the Interstate Commerce Commission, in the determination of which carrier mode is "low cost", must make this determination in terms of the "overall rate structure"

Not only has the Court relegated the Commission to the role of a computer of costs in resolving intermodal rate controversies but it has told the Commission that to be entitled to protection from competing rate reductions, however predatory, a given mode must be the "overall low cost mode" or "in general the low cost mode". (R. 255) Thus in any proceeding involving the reasonableness of a given competitive rate it would appear that, according to the Court below, evidence as to the cost of handling *all* traffic, by both involved modes, must be presented and ruled upon by the Commission. No party to these proceedings has contended for, or even suggested, the imposition of any such administrative burden upon the Commission, or of any such evidentiary burden upon the parties. The presentation of costs applicable to particular movements of traffic, between two particular points, is a laborious and time consuming process. The ascertainment of costs between all, or even a majority, of the points served, and with respect to the many commodities handled, by the domestic water carriers and their railroad competitors would be virtually an impossible task, staggering to contemplate, as we believe the appellees as well as the Commission will agree.

We submit that the insistence of the Court below that "overall" carrier costs be taken into account is

illustrative of the practical dangers into which the implementation of the "relative cost" theory of intermodal rate making can lead.

Point III. The Court below erred in ignoring the Congressional intent, as judicially and administratively construed, that efficient domestic water carrier service be protected from the destructive competitive rate practices of competing modes

The Commission's report below referred specifically to legislative and executive expressions dealing with the economic and defense importance of coastwise shipping. It referred to "A Review of the Coastwise and Intercoastal Shipping Trades" published by the United States Maritime Administration in 1955; to a report on domestic water carriers by the Committee on Interstate and Foreign Commerce of the Senate, entitled "1950 Merchant Marine Study and Investigation", and to its own previous report in *War Shipping Administration TA Application*, 260 I.C.C. 589, 591. (R. 38-40)[4] A more recent expression of the vital defense importance of domestic shipping is contained in "Ocean Shipping to Support the Defenses of the United States," Department of the Navy (1961), reproduced at 107 Cong. Rec. 7299-7302 (1961).

The Commission also specifically referred to the legislative intent, as clearly expressed in the Interstate Commerce Act, that efficient water services be fostered and preserved, if necessary by the allowance of differentials under the competing rail modes to compensate for service inferiority (49 U.S.C. 905(c); 907(d);

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[4] The vital military importance of the Sea-Land trailerships was emphasized in an article "Sea Transport in Atomic War", in evidence before the Commission. (Ex. 1, App. F, Doc. 10698)

907(f); and national transportation policy). (R. 40-41)

The Court below deprecates the Commission's reliance upon the "national defense" clause of the national transportation policy, holding that this is a "hoped for" end and is not stated "as an operative policy or means." (R. 256) The Court holds that even if the national defense portion of the policy were deemed to conflict with other portions thereof "we think it not proper to disregard the more recent expressions of Congressional intent contained in Section 15a(3)." (*ibid.*) But there is clearly no conflict between the concern for the maintenance of a strong transportation system as a weapon in time of military emergency, on the one hand, and Section 15a(3) of the Act on the other. There could only be conflict if the latter were intended to remove, and has the effct of removing, virtually all restrictions in the making of competitive rates, permitting ruinous rate wars on a "survival of the fittest" basis. Can it seriously be argued that the Congress, in enacting the 1958 Act, was blind to the catastrophic results that would follow the sanctioning of uninhibited competitive rate practices among the various carrier modes?

Moreover the Court below erroneously minimized the importance of expressions by the U.S. Maritime Administration and of a Senate Committee with respect to the importance of coastal shipping to the national defense. It stated, somewhat surprisingly, that the former "stresses the need for break bulk capacity" (R. 257). It goes without saying, and need not be argued, that there is an even greater need, from the standpoint of the military, for the more mobile, more efficient trailerships than for the out-moded

break bulk vessels, which were the only types available when the Maritime Administration report was prepared.[5]

The Court below held further, with respect to the report on domestic water carriers by the Committee on Interstate and Foreign Commerce entitled "1950 Merchant Marine Study and Investigation", that the expressions indicative of the essentiality of coastal water service to the national defense were made in the past and that the report "does not seem to have resulted in legislation" (R. 257). We respectfully submit that the greatest need of the domestic Merchant Marine in the early 1950s was not new legislation but the increase of operating efficiencies through improved methods of cargo handling. These methods have since been developed, and are being employed, by Sea-Land Service, Inc. With these new and more efficient methods of operation the domestic Merchant Marine, if permitted to survive, will obviously be in a far better position than in the past to contribute to the nation's defense in time of military emergency.

With respect to the shipper evidence before the Commission indicative of a need by the general public for the service of the coastwise water carriers, the Court

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[5] As testified by Vice Admiral Ralph E. Wilson, Hearings before Merchant Marine and Fishery Sub-committee of Senate Committee on Interstate and Foreign Commerce, on the "Decline of Coastwise and Intercoastal Shipping Industries", 86 Cong. 2d Sess. (1960) pp. 105-106: "At the outset of a major, nuclear war, the domestic deep water fleet would be uniquely fitted to act as a link between our coastal cities during the period of likely disturbance of systems of land transportation. * * * The ability of the domestic deep-water fleet to provide essential coastal and intercoastal movements of priority material might well be crucial. A number of the ships of this fleet are especially adapted for rapid cargo handling, giving them an increased value at such a critical time."

below held that should the Commission "heed the statute and allow the reductions (in rail rates), the 'need' in evidence may well disappear." (R. 257) This statement reflects a total failure to understand, or to accept, the economic importance of domestic water carriers in terms of their long range role in the national transportation system. It cannot be seriously denied that once the railroads, through uninhibited rate cutting practices, have succeeded in driving what remains of the domestic deep water carriers out of business—which is unquestionably their purpose, and which undoubtedly would be their accomplishment—the selective rates by which they would have achieved this purpose will be restored to previous levels; and the shipping public and the coastal areas of the country will be forever foreclosed from accessibility to low cost water transportation. The port authority, Department of Agriculture and shipper support of the Sea-Land position before the Interstate Commerce Commission (R. 18) clearly manifests public interest in the domestic water carrier services extending far beyond an immediate concern for rates lower than those of competing modes.

Irrespective of the holding of the Court below that "the specifications of the 1958 Act" require the condonation of largely unbridled competitive rate practices by the railroads in their efforts to obtain traffic moving by the water carriers, we submit that the Congress, in rejecting the "three shall nots" and in deliberately making reference in Section 15a(3) to the national transportation policy, unmistakably indicated its continued interest in the fostering and preservation of a strong system of transportation by water, as well as by other means, and an intention that this carrier mode be protected from competitive practices that destroy.

Point IV. The Court below has exceeded its statutory function

It is axiomatic that determinations of the justness and reasonableness of carrier rates are confided to the judgment and discretion of the Interstate Commerce Commission and that its conclusions may not be disturbed in the absence of error of law or abuse of discretion. As stated by this Court in *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U.S. 541, 547-548 (1912) "it (the Court) will not consider the expediency or wisdom of the order, or whether, on like testimony it would have made a similar ruling." As stated in *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 535-536 (1946): "It (the Court) cannot substitute its own view concerning what should be done, whether with refernce to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law." This Court has upon numerous other occasions recognized the broad discretion of the Commission in determining the justness and reasonableness of rates, as for example in *Western Chemical Co.* v. *United States*, 271 U.S. 268; *Virginian Ry.* v. *United States*, 272 U.S. 658; *Board of Trade* v. *United States*, 314 U.S. 534; and *Ayrshire Corporation* v. *United States*, 335 U.S. 573.

We respectfully submit that the opinion of the Court below is a clear-cut example of an attempt by a court to substitute its judgment for that of an administrative body in an area that has deliberately been left to the latter's expertise. The Court below has gone far beyond the function of determining whether the decision of the Commission was based upon adequate findings, supported by substantial evidence. Rather it has enunciated new theories of intermodal rate regulation,

some not contended for by any parties to these proceedings. It even takes issue with the Commission's ascertainment of, and treatment of, carrier costs—obviously an area which should be left to Commission expertise. (R. 253, 254)

The report of the Commission is detailed, reflects full and careful consideration of the evidence and the contentions of the parties, and contains the required findings. We respectfully except to the action of the Court below in substituting its judgment for that of the Commission's and in thus expanding the area of judicial review well beyond that contemplated in the statutes, and by the decisions of this Court.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted,

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January 7, 1963

APPENDIX

STATUTES INVOLVED

National Transportation Policy [49 U.S.C., Preceding §§ 1, 301, 901, and 1001]

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation service, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 15(7) [49 U.S.C., § 15]

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable

notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding had not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions prefer-

ence over all other questions pending before it and decide the same as speedily as possible.

Sec. 15a. as Amended [49 U.S.C. § 15a]

(1) [41 Stat. 488, 48 Stat. 220, 54 Stat. 912] When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) [41 Stat. 488, 48 Stat. 220, 54 Stat. 912] In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

(3) [72 Stat. 572] In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

Section 305. [49 U.S.C. § 905]

* * *

(c) [54 Stat. 934, 49 U.S.C. § 905] It shall be unlawful for any common carrier by water to make, give, or cause

any undue or unreasonable preference of advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description. Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

SEC. 307. [49 U.S.C. § 907]

(d) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

Proof of Service

I, Warren Price, Jr., attorney for Sea-Land Service, Inc., appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of January, 1963, I served copies of the foregoing Brief for Appellant Sea-Land Service, Inc. on the several parties hereto as follows:

1. On the United States, by mailing copies, in duly addressed envelopes, with first class postage prepaid, to Robert C. Zampano, Esq., United States Attorney for the District of Connecticut, Federal Building, New Haven, Connecticut; to Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C.; to Honorable Lee Loevinger, Assistant Attorney General, Department of Justice, Washington 25, D. C.; and to Richard H. Stern, Esq., Antitrust Division, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies, in duly addressed envelopes, with first class postage prepaid to Robert W. Ginnane, Esq., General Counsel, Interstate Commerce Commission, Washington 25, D. C.; and to B. Franklin Taylor, Jr., Esq., Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On the Appellees herein, by mailing copies in duly addressed envelopes, with first class postage prepaid to their counsel of record as follows: Eugene Hunt, Esq., and Thomas P. Hackett, Esq., 54 Meadow Street, New Haven 6, Connecticut; Carl Helmetag, Jr., Esq., 1138 Transportation Center, Six Penn Center Plaza, Philadelphia 4, Pennsylvania.

4. On the Appellant in No. 110, Seatrain Lines, Inc., by mailing copies in duly addressed envelopes with first class postage prepaid, to its counsel of record as follows: Alan S. Fuller, Esq., and Ralph D. Ray, Esq., Chadbourne, Parke,

Whiteside & Wolff, 25 Broadway, New York 4, N. Y.; Gumbart, Corbin, Tyler & Cooper, 205 Church Street, New Haven, Connecticut.

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